UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

DEBORAH ACETO,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Civil No.3:04CV01877(AWT)
	:	
TOWN OF BLOOMFIELD,	:	
BETSY J.S. HARD and	:	
STEVEN H. WEISHER,	:	
	:	
Defendants.	:	

RULING ON MOTION FOR SUMMARY JUDGMENT

The plaintiff brings the following six claims arising out of her termination as a police officer for the Town of Bloomfield: breach of contract against the Town (Count One); promissory estoppel against the Town and Betty J.S. Hard (Count Two); negligent infliction of emotional distress against all defendants (Count Three); intentional or reckless infliction of emotional distress against all defendants (Count Four); pursuant to 42 U.S.C. § 1983, violation of the plaintiff's right to personal privacy against all defendants (Count Five); and pursuant to 42 U.S.C. § 1983, sex discrimination in violation of the Equal Protection Clause against all defendants (Count Six). The defendants have filed a motion for summary judgment. The motion is being granted as to Counts Five and Six, and the court

declines to exercise supplemental jurisdiction over the plaintiff's state law claims, which are all that remain.

I. Factual Background

This case arises out of the termination of the plaintiff's employment. Plaintiff Deborah Aceto applied for a position as a police officer with the Town of Bloomfield Police Department (the "Department") in July 2002. After successfully completing a written test, she was invited to interview before a panel of officers and civilians. The Department informed the plaintiff that it was going to conduct a background investigation as part of determining her eligibility for the position, and the plaintiff consented to a background investigation by signing a written authorization and release form.[1] As part of the

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[1] The form reads as follows:

> I, Deborah Lynn Aceto, am making an application for appointment to the Bloomfield Police Department. As a result, I have freely consented to a background investigation to determine my eligibility for the position.
>
> Therefore the person, employer, institution, agency or department named above, or any authorized representative of said entity, is authorized to release to the Bloomfield Police Department, or its authorized representative, any and all information, documentary or otherwise, pertaining to me and maintained by the entity.
>
> I hereby release, discharge, exonerate and hold harmless the entity, its employees, agents, heirs and assigns from all liability, in any form, brought about by the release of any information to the Bloomfield Police Department or

background investigation, the plaintiff was required to submit her original high school diploma from the University School in Bridgeport, Connecticut.

The plaintiff received an appointment as a police officer on December 4, 2003. She entered the Police Officer Standards and Training Council Academy (the "Police Academy") on December 19, 2003. In connection with the plaintiff's entry into the Police Academy, both the plaintiff and defendant Betty J.S. Hard, the Chief of Police, executed a certification to the Police Academy acknowledging that each understood the entry requirements. The entry requirements, spelled out in detail in that document, included meeting the minimum education standard and having no felony, domestic violence or class A or class B misdemeanor convictions. With respect to the minimum education standard, the Regulations of Connecticut State Agencies, section 7-294e-16 provides in pertinent part as follows:

> **Sec. 7-294e-16. Entry-level requirements**
>
> (a) Educational requirement. The Police Officer Standards and Training Council requires, as a condition of appointment to a position of probationary candidate, that such person have:
>
> (1) graduated from an accredited high school, or

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its representatives about me in any form, written, electronic or verbally.

(Mot. Summ. J. Ex. D.)

(2) obtained a proper document evidencing that they have obtained, from a state-approved program, a formal certificate of equivalency to high school graduation.

Conn. Agencies Regs. § 7-294e-16 (2006).

Upon graduation from the Police Academy, the plaintiff would be on probation for a one-year period. While she was at the Police Academy, the plaintiff failed two of her classes and would not have been certified as a police officer until she had passed those classes.

Shortly before the date for the Police Academy graduation, a Connecticut State Trooper, Sergeant Leon Pierce, contacted Bloomfield Police Lieutenant Mark Samsel. Sergeant Pierce told Samsel that the plaintiff had engaged in prostitution in Connecticut and California and that she had been arrested in California for prostitution. Pierce's source of information was Magda Ferrer, who subsequently contacted Samsel and relayed the same information.

Chief Hard then told defendant Steven H. Weisher, the Deputy Chief, to reopen the plaintiff's background investigation. Weisher spoke with the vice investigator for the Pomona, California Police Department regarding the plaintiff. The vice investigator told Weisher that Wilkay Corporation, one of the plaintiff's former employers, was a front for pimping, prostitution and pandering. The plaintiff had informed the Department in her application that she had worked for Wilkay

Corporation as a receptionist, and the vice investigator also stated that Wilkay Corporation did not employ any receptionists, only escorts. The investigator would neither confirm nor deny the allegations against the plaintiff because certain Wilkay Corporation employees had been granted immunity for participating in an investigation. Defendant Weisher did not investigate the claim of prostitution in Connecticut because the Connecticut businesses listed on the plaintiff's application were no longer in existence.

During the reopened investigation, defendant Weisher also contacted the University School to verify the plaintiff's high school diploma. Although he was able to verify that the plaintiff had graduated from the program, there was a question about the accreditation of the program. Therefore, Weisher contacted the Connecticut State Department of Education, which informed him that degrees earned by completion of correspondence courses, which was what the University School offered, were not state approved. Defendant Hard recommended that the plaintiff's employment be terminated based on the fact that the plaintiff's high school diploma was invalid because it was from an unaccredited program.

Defendant Weisher, Lieutenant Samsel, a union representative, and the plaintiff met on May 6, 2004. Defendant Weisher told the plaintiff about the allegations of prostitution

that led to the reinvestigation of her background and about the discovery of the fact that her high school diploma was from an unaccredited program. The plaintiff contends that defendant Weisher berated her and conducted the termination in a brutal manner, reducing her to tears. She claims that Weisher accused her of being a prostitute and asserted that a former place of employment in Connecticut was "a front for illegal activities." (Aceto Dep. at 160.) She also claims that defendant Hard was in a nearby office with the door open and heard the conversation. The plaintiff contends that Weisher asked for her resignation; Weisher states that the plaintiff asked if she could resign. The union representative requested that the plaintiff be allowed to get her GED from an accredited program and also strongly urged the plaintiff not to resign. The plaintiff subsequently received a high school diploma from an accredited program. She contends that the Department fired her because of the prostitution allegations.

The plaintiff's breach of contract and promissory estoppel claims are based on a conversation between the plaintiff and defendant Hard. Prior to beginning at the Police Academy, the plaintiff filed a complaint against a constable for the Town of Middlefield. An investigator contacted her at the Police Academy, and the plaintiff was concerned this would affect her employment with the Department. She and defendant Hard met to

discuss this concern and defendant Hard assured the plaintiff that this would not be the case. The plaintiff contends that this discussion resulted in a contract not to fire the plaintiff as a consequence of the investigation.

II. Legal Standard

The court may not grant a motion for summary judgment unless it determines that there is no genuine issue of material fact to be tried, and the facts as to which there is no such issue warrant judgment for the moving party as a matter of law. Fed. R. Civ. P. 56(c). See Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Gallo v. Prudential Residential Servs., 22 F.3d 1219, 1223 (2d Cir. 1994). Rule 56(c) "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." See Celotex Corp., 477 U.S. at 322.

When ruling on a motion for summary judgment, the court must respect the province of the jury. Therefore the court may not try issues of fact. See e.g., Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); Donahue v. Windsor Locks Bd. of Fire Comm'rs, 834 F.2d 54, 58 (2d Cir. 1987); Heyman v. Commerce & Indus. Ins. Co., 524 F.2d 1317, 1319-20 (2d Cir. 1975). It is well-established that "[c]redibility determinations, the weighing

of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of the judge." Anderson, 477 U.S. at 255. Thus the trial court's task is "carefully limited to discerning whether there are any genuine issues of material fact to be tried, not to deciding them. Its duty, in short, is confined . . . to issue-finding; it does not extend to issue-resolution." Gallo, 22 F.3d at 1224.

Summary judgment is inappropriate only if the issue to be resolved is both genuine and related to a material fact. Therefore, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. An issue is "genuine . . . if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson, 477 U.S. at 248 (internal quotation marks omitted). A material fact is one that would "affect the outcome of the suit under the governing law." Id. As the court observed in Anderson: "the materiality determination rests on the substantive law, [and] it is the substantive law's identification of which facts are critical and which facts are irrelevant that governs." Id. Thus only those facts that must be decided in order to resolve a claim or defense will prevent summary judgment from being granted. When confronted with an asserted factual dispute, the court must examine the elements of the claims and defenses at issue on the

motion to determine whether a resolution of that dispute could affect the disposition of any of those claims or defenses. Immaterial or minor facts will not prevent summary judgment. See Howard v. Gleason Corp., 901 F.2d 1154, 1159 (2d Cir. 1990).

When reviewing the evidence on a motion for summary judgment, the court must "assess the record in the light most favorable to the non-movant and . . . draw all reasonable inferences in its favor." Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000) (quoting Del. & Hudson Ry. Co. v. Consol. Rail Corp., 902 F.2d 174, 177 (2d Cir. 1990)). Because credibility is not an issue on summary judgment, the nonmovant's evidence must be accepted as true for purposes of the motion. Nonetheless, the inferences drawn in favor of the nonmovant must be supported by the evidence. "[M]ere speculation and conjecture" is insufficient to defeat a motion for summary judgment. Stern v. Trs. of Columbia Univ., 131 F.3d 305, 315 (2d Cir. 1997) (quoting W. World Ins. Co. v. Stack Oil, Inc., 922 F.2d 118, 121 (2d Cir. 1990)). Moreover, the "mere existence of a scintilla of evidence in support of the [nonmovant's] position" will be insufficient; there must be evidence on which a jury could "reasonably find" for the nonmovant. Anderson, 477 U.S. at 252.

Finally, the nonmoving party cannot simply rest on the allegations in its pleadings since the essence of summary

judgment is to go beyond the pleadings to determine if a genuine issue of material fact exists. See Celotex Corp., 477 U.S. at 324. "Although the moving party bears the initial burden of establishing that there are no genuine issues of material fact," Weinstock, 224 F.3d at 41, if the movant demonstrates an absence of such issues, a limited burden of production shifts to the nonmovant, which must "demonstrate more than some metaphysical doubt as to the material facts, . . . [and] must come forward with specific facts showing that there is a genuine issue for trial." Aslanidis v. U.S. Lines, Inc., 7 F.3d 1067, 1072 (2d Cir. 1993) (quotation marks, citations and emphasis omitted). Furthermore, "unsupported allegations do not create a material issue of fact." Weinstock, 224 F.3d at 41. If the nonmovant fails to meet this burden, summary judgment should be granted. The question then becomes: is there sufficient evidence to reasonably expect that a jury could return a verdict in favor of the nonmoving party. See Anderson, 477 U.S. at 248, 251.

III. Discussion

A. § 1983 Claim for Sex Discrimination

The plaintiff contends that if she had been male, the Department would not have conducted any further investigation of her background in response to the information reported to Lieutenant Samsel. "Individuals have a clear right, protected by the Fourteenth Amendment, to be free from discrimination on the

basis of sex in public employment." Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 117 (2d Cir. 2004). Equal protection claims for sex discrimination in employment may be brought against a municipality under § 1983. Id. at 128. "To make out such a claim, the plaintiff must prove that she suffered purposeful or intentional discrimination on the basis of gender." Id. at 118. Once discrimination is proven, the municipality must provide an "exceedingly persuasive justification" for the discrimination. Id. (citing United States v. Virginia, 518 U.S. 515, 524 (1996)).

Sex discrimination claims under § 1983 are evaluated using the McDonnell Douglas framework. Back, 365 F.3d at 123 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). The first step is to inquire "whether the plaintiff has successfully asserted a prima facie case of gender discrimination against these defendants." Back, 365 F.3d at 123. To make out a prima facie case the plaintiff must show "(1) membership in a protected class; (2) satisfactory job performance; (3) termination from employment or other adverse employment action; and (4) . . . the discharge . . . occurred under circumstances giving rise to an inference of discrimination on the basis of plaintiff's membership in that class." Farias v. Instructional Sys., Inc., 259 F.3d 91, 98 (2d Cir. 2001). "Once a plaintiff makes out a prima facie case of discrimination, the defendants have the

burden of showing a legitimate, nondiscriminatory reason for their actions. In order to prevent summary judgment in favor of the plaintiff at this stage, that explanation must, if taken as true, 'permit the conclusion that there was a nondiscriminatory reason for the adverse action.'" Back, 365 F.3d at 123 (quoting St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 509 (1993)). The plaintiff is not required to produce evidence that similarly situated men were treated differently. Back, 365 F.3d at 124. If the defendants articulate a non-discriminatory reason, then at the third stage, the burden shifts back to the plaintiff "to show that the reasons profferred [sic] by the defendant[s] were not the defendant[s'] true reasons, but rather a pretext for discrimination." Taitt v. Chemical Bank, 849 F.2d 775, 777 (2d Cir. 1988).

The defendants concede that the plaintiff is a member of a protected group and that she suffered an adverse employment action. However, they contend that the discharge did not occur under circumstances that give rise to an inference of sex discrimination and also contend that the plaintiff has failed to produce any evidence to substantiate her claim of sex discrimination. In addition, they argue that there is no genuine issue as to whether the plaintiff was terminated because she was not qualified for the position.

The defendants point out that, because defendant Hard made the decision to terminate the plaintiff, and Hard is a member of the same protected class, there exists an inference against discrimination. "A well-recognized inference against discrimination exists where the person who participated in the allegedly adverse decision is also a member of the same protected class." McHenry v. One Beacon Ins. Co., No. Civ.A. 03-CV-4916, 2005 WL 2077275, at *7 (E.D.N.Y. Aug. 29, 2005) (citing Marlow v. Office of Ct. Admin. of N.Y., 820 F. Supp. 753, 757 (S.D.N.Y. 1993), aff'd, 22 F.3d 1091 (2d Cir. 1994). "Although this does not end the inquiry, it provides an additional inference which plaintiff must overcome." Id. (citing Toliver v. Cmty. Action Comm'n to Help the Econ., 613 F. Supp. 1070, 1074 (S.D.N.Y. 1985), aff'd, 800 F.2d 1128 (2d Cir. 1986). See also Booze v. Shawmut Bank, Conn., 62 F. Supp. 2d 593, 598 (D. Conn. 1999) (no inference of discrimination could be made, especially when most of the plaintiff's disciplinarians were also African American); Toliver, 613 F. Supp. at 1074 (inference of discrimination attenuated given the race and gender diversity of the decision-making board).

The defendants also point out that because defendant Hard made both the decision to hire and the decision to fire the plaintiff, it is difficult to draw an inference of discrimination. "[W]hen the person who made the decision to fire

was the same person who made the decision to hire, it is difficult to impute to her an invidious motivation that would be inconsistent with the decision to hire. This is especially so when the firing has occurred only a short time after the hiring." Grady v. Affiliated Cent., Inc., 130 F.3d 553, 560 (2d Cir. 1997). See also Giordano v. Gerber Scientific Prods., No. 3:99CV00712(EBB), 2000 U.S. Dist. LEXIS 22178, at *19 (D. Conn. Nov. 14, 2000) (fact that termination occurred nine months after hiring by same individual supported "a strong inference that discrimination was not a motivating factor in the employment decision").

The plaintiff has not provided any evidence that would support a reasonable inference that the discharge was the result of sex discrimination, and she does not even mention the sex discrimination claim in her memorandum in opposition to the motion for summary judgment. Moreover, the plaintiff testified during her deposition that her allegations of sex discrimination are based on her feeling that if she was male, then the allegations of prostitution would not have been taken seriously and would have been "swept right under the carpet." (Aceto Dep. at 180.) When the plaintiff was asked whether she was "just making a guess" about that, she stated, "If you want to call it that." (Id.) The plaintiff acknowledged that she was not aware of any male police officer employed by the Department who was

permitted to graduate from the Police Academy despite the fact that he had not received a high school diploma accredited by the State of Connecticut.

Thus, the plaintiff has failed to meet her de minimis burden for making out a prima facie case. She has failed to produce any evidence to counter the evidence offered by the defendants to show that the circumstances support an inference of the absence of discrimination. Also, in any event, assuming arguendo that the plaintiff had satisfied her minimal burden of making out a prima facie case, she has produced no evidence that would support a reasonable inference that the defendants' proffered reason for terminating her employment was a pretext for sex discrimination. Therefore, the defendants' motion for summary judgment on the plaintiff's sex discrimination claim is being granted.

B. § 1983 Claim for Violation of Right to Privacy

The plaintiff alleges that the additional background investigation, conducted by the Department after defendant Hard was notified of the allegations against the plaintiff, was a violation of her right to privacy. "Although the right to privacy is one of the less easily delineated constitutional guarantees, the Supreme Court has held that it encompasses 'the individual interest in avoiding disclosure of personal matters.'" Statharos v. New York City Taxi & Limousine Comm'n, 198 F.3d 317, 322 (2d Cir. 1999)(quoting Whalen v. Roe, 429 U.S. 589, 599

(1977)). The "confidentiality interest is not absolute, however, and can be overcome by a sufficiently weighty government purpose." Statharos, 198 F.3d at 323. "[L]egitimate countervailing social needs may warrant some intrusion despite an individual's reasonable expectation of privacy . . . . However the interference allowed may be no greater than that necessary to protect the overriding public interest." Galella v. Onassis, 487 F.2d 986, 995 (2d Cir. 1973). Many § 1983 claims for violation of the right to privacy relate to disclosure of financial records and medical information to the public. See e.g., Doe v. City of New York, 15 F.3d 264, 267 (2d Cir. 1994) (individuals infected with HIV have constitutional right to privacy regarding their condition); Statharos, 198 F.3d at 320-21 (constitutionally protected privacy interest in personal financial information). These cases involving disclosure of personal information are very different from the situation here, where no such disclosure is claimed. Here, the plaintiff bases her claim on the fact that the Department investigated her personal background.

The defendants argue, correctly, that because the plaintiff authorized the Department to conduct a background investigation, this claim lacks merit. The form executed by the plaintiff states explicitly that she has consented to a background investigation to determine her eligibility for the position. The form makes it clear that the Department can seek any and all

information pertaining to the plaintiff. There is no limitation on the time period during which the investigation can be conducted, or on whether it can be reopened, but in any event it was reasonable for the Department to reopen the investigation when it did; the plaintiff had not graduated from the Police Academy or completed her one-year period of probation. Moreover, in any event, the plaintiff admitted during her deposition that it was reasonable for the Department to reopen the background investigation once it received a report that she had been involved in illegal activity, and the plaintiff indicated that she was not making a challenge based on the time period when the additional investigation was concluded.

Thus, the plaintiff waived in writing any right she had not to have a background investigation conducted by the Department when she signed the Department's authorization and release form. Therefore, the plaintiff cannot prevail on her § 1983 privacy claim, and the defendants' motion for summary judgment on this claim is being granted.

C. State Law Claims: Breach of Contract, Promissory Estoppel, Intentional Infliction of Emotional Distress, and Negligent Infliction of Emotional Distress

The plaintiff's remaining claims are state law claims. "The district courts may decline to exercise supplemental jurisdiction over a [state law] claim . . . if . . . the district court has dismissed all claims over which it has original jurisdiction."

28 U.S.C.A. § 1367 (c)(3). "[P]endent jurisdiction is a doctrine of discretion, not of plaintiff's right." United Mine Workers of Am. v. Gibbs, 383 U.S. 715, 726 (1966).

While dismissal of the state law claims is not mandatory, Rosado v. Wyman, 397 U.S. 397, 403-05 (1970); Carnegie-Melon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988), when "all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine--judicial economy, convenience, fairness, and comity--will point toward declining to exercise jurisdiction over the remaining state-law claims." Carnegie-Mellon, 484 U.S. at 350 n.7.

Because the court is granting the motion for summary judgment as to the plaintiff's § 1983 claims, and those are the only claims over which the court has original jurisdiction, the court declines to exercise supplemental jurisdiction over the plaintiff's state law claims.

IV. Conclusion

For the reasons set forth above, the defendants' Motion for Summary Judgment (Doc. No. 21) is hereby GRANTED. Judgment shall enter in favor of the defendants on Count Five and Count Six, and Counts One, Two, Three and Four are hereby DISMISSED pursuant to 28 U.S.C. § 1367(c)(3).

The Clerk shall close this case.

It is so ordered.

Dated this 19th day of May 2006 at Hartford, Connecticut.

/s/Alvin W. Thompson

Alvin W. Thompson
United States District Judge